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April 6, 1998

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BY HAND DELIVERY

Magalie Roman Salas, Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: *Comments in IB Docket No. 98-21*

Dear Ms. Salas:

Enclosed for filing you will find an original and nine (9) copies of the Comments of The News Corporation Limited in the above-referenced proceeding, which includes sufficient copies for service upon all five Commissioners.

Also enclosed is an extra copy, to be stamped as filed and returned with our messenger.

If you have any questions, please do not hesitate to call me at 202-857-9752.

Sincerely,

William M. Wiltshire

Enclosures

cc: Christopher J. Murphy
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In the Matter of

**POLICIES AND RULES FOR THE
DIRECT BROADCAST SATELLITE SERVICE**

IB Docket No. 98-21

COMMENTS OF THE NEWS CORPORATION LIMITED

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April 6, 1998

SUMMARY

In its 1995 *DBS Auction Order*, the Commission stated its belief “that competition should be favored over regulation wherever possible.” News Corp. could not agree more. Imposing regulatory restrictions on DBS ownership would limit the sources of capital available to finance technological developments, stifle the potential for creative combinations of DBS resources necessary for innovative service offerings, and serve only as an additional hurdle to providing robust competition in the MVPD market.

The Commission has repeatedly and consistently declined to impose ownership restrictions on DBS licensees, most recently less than three years ago in the *DBS Auction Order*. If anything, developments over the last few years have further decreased any rationale for adopting such restrictions by increasing the available supply of DBS capacity. The Commission should continue to make its ownership determinations on a case-by-case basis, taking into account the then-prevailing state of the market and of technology. Adopting static ownership rules would be inappropriate for this dynamic service.

FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

**POLICIES AND RULES FOR THE
DIRECT BROADCAST SATELLITE SERVICE**

IB Docket No. 98-21

COMMENTS OF THE NEWS CORPORATION LIMITED

The News Corporation Limited ("News Corp.") submits the following comments on the Notice of Proposed Rulemaking issued by the Commission on February 26, 1998 related to the Direct Broadcast Satellite ("DBS") service.¹ These comments focus on whether the Commission should impose restrictive ownership rules on DBS licensees. News Corp. submits that no category of potential entrant should be precluded from or limited in participating in this developing market. We agree with the Commission's statement in the *DBS Auction Order* "that competition should be favored over regulation wherever possible,"² allowing all comers to compete so that market forces – and not regulations – will determine which services thrive.

Throughout the existence of the DBS service, the Commission has maintained a commitment to a flexible regulatory structure, as befits a nascent, rapidly evolving,

¹ *Policies and Rules for the Direct Broadcast Satellite Service*, FCC 98-26 (rel. Feb. 26, 1998) ("DBS NPRM").

² *Revision of Rules and Policies for the Direct Broadcast Satellite Service*, 11 FCC Rcd. 9712, 9723 (1995) ("DBS Auction Order").

technologically advanced service.³ Most of the proposals in the *DBS NPRM* are consistent with this tradition, streamlining and eliminating rules to reduce the regulatory burden on DBS operators. The questions raised about ownership limitations, however, run directly counter to this deregulatory trend. News Corp. agrees with Chairman Kennard that “the FCC can encourage competition by being vigilant in ensuring that all regulations affecting these multichannel video (and other) competitors impose as small a burden as possible and do not in fact operate to impede competition.”⁴ Since DBS ownership restrictions would be burdensome, unnecessary, and counterproductive, the Commission should continue to reject them as it has consistently done in the past.

I. THE COMMISSION SHOULD CONTINUE ITS TRADITION OF FLEXIBLE REGULATION OF THE DBS SERVICE AND NOT ADOPT GENERAL RULES RESTRICTING ELIGIBILITY FOR DBS LICENSEES.

The *DBS NPRM* seeks comment on two competition-related ownership issues: first, whether the Commission should limit DBS spectrum aggregation; and second, whether it should limit cross-ownership with other multichannel video programming distributors (“MVPDs”). The Commission has repeatedly considered these same restrictions, most recently just over two years ago in the context of the then-impending auction of DBS spectrum.⁵ In almost every case, it has rejected ownership limitations.

³ See, e.g., *Direct Broadcast Satellite Service*, 90 F.C.C.2d 676, 707-09, 719 (1982) (public interest will be served by imposing “a minimum of regulation,” including a flexible regulatory approach allowing DBS operators to be either broadcasters or common carriers and eschewing stringent financial showings); *United States Satellite Broadcasting Co.*, 1 FCC Rcd. 977, 978 (1986) (reiterating “the Commission’s intention to be as open and flexible in permitting various uses of the DBS allocation as possible”); *DISCO I*, 11 FCC Rcd. 2429, 2439 (1996) (Commission sees no reason for imposing any barriers on the use of U.S.-licensed DBS systems for international services).

⁴ See Response of William E. Kennard to Question 13 from Majority Members of the Senate Commerce, Science, and Transportation Committee (*reprinted in Washington Telecom Week*, Oct. 10, 1997 at p. 17).

⁵ See *DBS Auction Order*, *supra*.

And in the one case where such limitations were imposed, the Commission did so only through a temporary rule designed to preserve regulatory flexibility specifically in recognition of the changing nature of the DBS market. If anything, there is even less reason for any ongoing restrictions on ownership today than there was at any time since the DBS service was created in 1982.

A. The Commission Has Consistently Resisted Attempts to Impose Ownership Limitations on the DBS Service.

The Commission has repeatedly and consistently rejected the imposition of ownership restrictions in the DBS service. This trend began in 1982 with the promulgation of the original rules for the service. The Commission rejected multiple ownership restrictions, preferring to allow the market – specifically, the considerable degree of competition expected among DBS systems as well as the many alternative video services that would also be available – to constrain the exercise of market power, with an assist from Commission oversight where necessary in particular cases.⁶ In 1989, the Commission declined to impose a cable/DBS cross-ownership restriction in connection with the DBS permit being sought by Tempo Satellite, which was then a subsidiary of Tele-Communications, Inc.⁷ In 1995, the Commission declined to impose multiple-ownership restrictions in connection with EchoStar's application to acquire control of Directsat, another DBS permittee that had been assigned DBS channels capable of full-CONUS service.⁸ These actions in the DBS field are consistent with the

⁶ *Direct Broadcast Satellite Service*, 90 F.C.C.2d at 712.

⁷ *See Continental Satellite Corp.*, 4 FCC Rcd. 6292, 6298-99 (1989).

⁸ *Direcstar Corp.*, 10 FCC Rcd. 88, 89 (1995). In 1996, the Commission approved EchoStar's acquisition of DBSC's partial-CONUS DBS authorizations as well. *Direct Broadcasting Satellite Corp.*, 11 FCC Rcd. 10494 (1996).

larger trend toward eliminating cross-ownership restrictions throughout the telecommunications industry.⁹

In its most recent and comprehensive consideration of DBS ownership limitations -- the *DBS Auction Order* -- the Commission rejected any MVPD cross-ownership restriction and adopted only a minimal, short-term restriction on multiple ownership. It found that the presence of other, non-MVPD-affiliated DBS operators (such as the two existing providers, DIRECTV and EchoStar) “severely constrains the strategic activities of an MVPD-DBS combination.”¹⁰ Moreover, an operator affiliated with another MVPD would bring certain positive attributes -- including financial assets and experience with program acquisition, marketing, and distribution -- as a DBS permittee.¹¹

In the same proceeding, however, the Commission adopted a one-time, auction-only rule restricting the aggregation of channels at more than one full-CONUS DBS orbital location.¹² In adopting a rule of such limited scope and duration, the Commission explicitly and intentionally preserved the DBS industry’s ability to respond in the future to changed circumstances as well as its own ability to review future transactions on a

⁹ For example, the Telecommunications Act of 1996 repealed the statutory ban on cable/TV station cross ownership and directed the Commission to substantially eliminate the network/cable cross-ownership ban and to relax restrictions on local radio station ownership. See Pub. L. 104-104, § 202(i) (amending 47 U.S.C. § 533(a)). The Commission is currently questioning many other similar restrictions in the broadcast field. See, e.g., *Review of the Commission’s Regulations Governing Attribution of Broadcast and Cable/MDS Interests*, Further Notice of Proposed Rulemaking, FCC 96-436 (rel. Nov. 7, 1996).

¹⁰ *DBS Auction Order*, 11 FCC Rcd. at 9740. See also *id.* at 9753 (“competitive rivalry among DBS firms, even where one of those firms is affiliated with a cable operator, will cause pressures for price competition and should lead to vigorous competition between cable and DBS systems”).

¹¹ *Id.* at 9740.

¹² The rule required any person with an attributable interest in DBS channels at one full-CONUS location to divest this interest before acquiring an attributable interest in the full-CONUS channels then available at auction. *DBS Auction Order*, 11 FCC Rcd. at 9736.

flexible case-by-case basis.¹³ The Commission concluded that the public interest would *not* be furthered “by freezing this industry structure through a rule permanently precluding future channel combinations at multiple full-CONUS locations.”¹⁴

As the Commission has observed on a number of occasions, existing antitrust laws and the opportunity for Commission review of a proposed DBS assignment or transfer of control are sufficient to safeguard competition.¹⁵ And as Commissioners Powell and Furchtgott-Roth observed in their separate statements on the *DBS NPRM*, given the limited number of slots and licensees under its jurisdiction, the Commission will be able easily to assess proposed DBS combinations and acquisitions on a case-by-case basis,¹⁶ taking into consideration the then-prevailing circumstances in a manner that a general rule cannot. In these circumstances, a rigid rule of general applicability is unnecessary and would create a static regime that is inappropriate for such a dynamic and fast-evolving market.

¹³ *Id.* at 9737.

¹⁴ *Id.* at 9724.

¹⁵ *See, e.g., DBS Auction Order*, 11 FCC Rcd. at 9741 (“Because such a transaction would require Commission approval, we would be in a position to assess the competitive landscape if and when such a transaction was proposed, and to grant, deny, or condition authorization as appropriate under the circumstances at that time”); *Continental Satellite Corp.*, 4 FCC Rcd. 6292, 6299 (1989) (“existing antitrust law and Commission oversight are sufficient to prevent any conduct that is illegal or deleterious to the DBS industry and its customers, or to operators and customers in the other video entertainment distribution industries as well”); *Direct Broadcast Satellite Service*, 90 F.C.C.2d at 712 (“existing antitrust laws would provide adequate protection against possible abuses of market power due to horizontal concentration of control”).

¹⁶ As noted in Section II, *infra*, the number of DBS orbital locations capable of providing full-CONUS service has increased, and is likely to increase further. While each new slot increases existing full-CONUS capacity by 33%, the number over which the Commission exercises jurisdiction will not increase to more than six even if all pending applications are granted.

B. Recent Developments Have Further Undercut the Rationale for Ownership Limitations.

It is elementary that the Commission may not depart from an established a policy – such as the rejection of DBS ownership limitations evidenced above – without a reasoned explanation demonstrating a rational reason for doing so.¹⁷ In this case, events since the Commission last considered ownership limitations have only strengthened the case for continuing the policy against such regulation.

The competition-related concerns traditionally advanced in support of ownership limitations rest primarily upon the premise that the scarcity of DBS resources – and particularly full-CONUS DBS resources – justifies rules designed to prevent concentration of those resources. Technological and marketplace developments over the last two and a half years have disposed of this “scarcity” rationale. First, the number of DBS orbital locations available for providing full-CONUS service has increased substantially. The Commission has entered into a DBS/DTH Protocol with Mexico that will allow service to the U.S. from the full-CONUS locations allocated to Mexico,¹⁸ and negotiations are virtually complete for a similar agreement with Argentina. The Commission has also adopted rules under which any of the many other foreign-licensed satellites at orbital locations capable of full-CONUS coverage may provide service in the

¹⁷ See, e.g., *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970) (an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored), *cert. denied*, 403 U.S. 923 (1971).

¹⁸ See Protocol Concerning the Transmission and Reception of Signals from Satellites for the Provision of Direct-to-Home Satellite Services in the United States of America and the United Mexican States (Nov. 8, 1996).

United States.¹⁹ In addition, the Commission has under consideration an application from DIRECTV to expand the frequency bands available for DBS service.²⁰

Second, the Commission has over the last two years licensed several new satellites capable of providing full-CONUS DTH-FSS service in the Ku- and Ka-bands.²¹ As the Commission itself has noted, the high-power Ka-band provides next-generation broadband capacity that promises new and innovative direct-to-home satellite services, and applicants are proposing to combine DBS-band satellite functions with the functions of satellite services in other bands at the same or adjacent orbital locations.²² Hughes is already providing a similar combined service using DBS and Ku-band DTH-FSS satellites.²³

Third, there has been a proliferation of terrestrial digital MVPD platforms. Cable operators are upgrading their systems to include digital capabilities, which will enable them to provide a greater range of programming and other services. The Commission authorized digital MMDS in July 1996, which will allow the provision of many more channels of programming through the use of digital compression, an increased range of

¹⁹ *Amendment of the Commission's Regulatory Policies to Allow Non-U.S. Licensed Space Stations to Provide Domestic and International Satellite Service in the United States*, FCC 97-399 at ¶¶ 98-101 (rel. Nov. 26, 1997) ("*DISCO II*") (adopting an effective competitive opportunities test for DBS services from foreign-licensed satellites).

²⁰ *See* Application of DIRECTV Enterprises, Inc. for Authority to Construct, Launch, and Operate an Expansion System of Direct Broadcast Satellites, Docket No. 75/76/77-SAT-P/LA-97 (filed June 5, 1997).

²¹ *See Assignment of Orbital Locations to Space Stations in the Domestic Fixed-Satellite Service*, DA 96-713 (Int'l Bur. rel. May 7, 1996); *Assignment of Orbital Locations to Space Stations in the Ka-band*, DA 97-967 (Int'l Bur. rel. May 9, 1997).

²² *DBS NPRM* at ¶¶ 1, 13. In fact, one company has announced a plan to use a Ka-band satellite for the retransmission of local broadcast signals, offering all DBS providers a local station package of all over-the-air, full power, commercial television stations within a given station's designated market area. *See 1997 Cable Competition Report*, FCC 97-423 at ¶ 58 (rel. Jan. 13, 1998).

²³ *See* "DirecTV Plans to Add Ku-Band Offering in U.S.," Telecommunications Reports, Jan. 26, 1998, at p. 19.

service, improved picture and sound quality, and the ability to provide two-way data transmission services.²⁴ The Commission recently completed the auction of two LMDS licenses in each Basic Trading Area in the United States, which can be used to deliver multichannel video as well as two-way voice and data services.²⁵ And digital broadcast television is scheduled to debut later this year, promising a range of services that could include high-definition television, multiple channels of standard definition television, or a combination of the two.²⁶

All of these innovative technologies will compete in the marketplace for customers, as well as for capital to finance the tremendous costs of putting systems in place. Ownership limitations may hobble the DBS service by denying it access to sources of capital during this important window of opportunity, and thereby prolong or prevent its development as a robust competitor in the MVPD marketplace. Accordingly, by limiting the capital available to finance development of DBS systems, such restrictions would actually be deleterious from a competition perspective.

II. ADOPTING ADDITIONAL FOREIGN OWNERSHIP RESTRICTIONS APPLICABLE ONLY TO THE DBS SERVICE WILL IMPEDE ITS ABILITY TO PROVIDE ROBUST COMPETITION IN THE MVPD MARKET.

The International Bureau has correctly determined that subscription DBS is not a broadcast or common carrier service to which the foreign ownership restrictions of

²⁴ See *1997 Cable Competition Report* at ¶ 72.

²⁵ See *Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services*, FCC 97-82 at ¶ 173 (rel. March 13, 1997). The larger LMDS license is "unprecedented," allowing the use of over twice as much spectrum as is available at any DBS orbital location.

²⁶ See *Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service*, Fifth Report and Order, FCC 97-116 (rel. April 21, 1997).

Section 310(b) of the Communications Act apply, and that the Commission's codification of this provision in Section 100.11 was not intended to extend beyond the statutory proscription.²⁷ The *DBS NPRM* requests comment on whether the Commission should at this time extend its rules to apply foreign ownership restrictions to subscription DBS providers as well.²⁸

No other MVPD -- including cable -- operates under such a handicap. It would be counterproductive and poor public policy to limit an additional source of capital in such a capital-intensive industry, where construction, launch, and operation of a DBS satellite, acquisition, processing, and uplinking of programming, and nationwide marketing, billing, and servicing requires billions of dollars to compete effectively.

The Commission's consideration of foreign ownership restrictions for the cable television industry provides an instructive parallel. There, as here, the issue arose in two rulemakings over a short period of time. In 1976, the Commission rejected such restrictions, based in part upon the observation that citizenship prohibitions would cut off a source of capital investment and thereby deter the development of cable television. The Commission concluded that it "ought not deny these resources to cable without overriding reasons of national importance," and that in the absence of a demonstrable harm that would be corrected, free market forces should be allowed to determine the direction of capital flow within the industry.²⁹ Revisiting the issue in 1980, the

²⁷ *MCI Telecommunications Corp.*, DA 96-1793 at ¶¶ 16-27 (Int'l Bur., Dec. 6, 1996), *recon. pending*.

²⁸ *DBS NPRM* at ¶ 21.

²⁹ *Amendment of Parts 76 and 78 of the Commission's Rules to Adopt General Citizenship Requirements for Operation of Cable Television Systems and for Grant of Station Licenses in the Cable Television Relay Service*, 59 F.C.C.2d 723, 727 (1976) ("CATV Ownership").

Commission again rejected foreign ownership limitations on similar grounds, concluding that such restrictions would not benefit the television viewing public but instead would “merely promote the self interests of the domestic cable television industry at the expense of additional competitive alternatives for the public.”³⁰

There has been no further attempt to impose foreign ownership limitations on the cable industry since 1980. There are also no foreign ownership limitations applicable to any other subscription MVPD service – not DTH-FSS, MMDS, LMDS, OVS, or SMATV.³¹ For the Commission to single out the DBS service for disparate treatment and thereby deny DBS operators access to foreign capital available to every other MVPD operator would be arbitrary and irrational – especially in the absence of “overriding reasons of national importance” or “a demonstrable harm that would be corrected.”³² The Commission should reject any attempt to impose foreign ownership restrictions in this manner.

³⁰ *Amendment of Parts 76 and 78 of the Commission’s Rules to Adopt General Citizenship Requirements for Operation of Cable Television Systems and for Grant of Station Licenses in the Cable Television Relay Service*, 77 F.C.C.2d 73, 80 (1980).

³¹ Of course, to the extent that any operator uses its facilities to provide a broadcast or common carrier service, the statutory restrictions of Section 310(b) would apply regardless of any action the Commission might take in this proceeding.

³² *CATV Ownership*, 59 F.C.C.2d at 727.

CONCLUSION

For the foregoing reasons, News Corp. submits that the Commission should not adopt any generally applicable restrictions on ownership of DBS licenses.

Respectfully submitted,

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